

VZCZCXRO9201
PP RUEHDBU
DE RUEHKV #0746/01 0881526
ZNY CCCCC ZZH
P 291526Z MAR 07
FM AMEMBASSY KYIV
TO RUEHC/SECSTATE WASHDC PRIORITY 1735
INFO RUEHZG/NATO EU COLLECTIVE
RUCNCIS/CIS COLLECTIVE

C O N F I D E N T I A L SECTION 01 OF 04 KYIV 000746

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E.O. 12958: DECL: 03/29/2017
TAGS: [PGOV](#) [PREL](#) [PINR](#) [UP](#)
SUBJECT: UKRAINE: NEW ELECTIONS OR BROAD COALITION? ALL
EYES ON YUSHCHENKO

Classified By: Ambassador for reasons 1.4(a,b,d).

11. (C) President Yushchenko, who has increasingly few options in his losing struggle with Prime Minister Yanukovych, is being pushed hard by his team to disband the Rada, but the President has not yet abandoned hope of reaching accommodation with Yanukovych. At the urging of opposition leader Tymoshenko and Head of the Presidential Secretariat Baloha, Yushchenko on March 28-29 published letters and a draft decree threatening the Rada with action (presumably dismissal) if mass shifting of MPs into the coalition continued. He argued that the MPs were acting unconstitutionally and threatening the political stability of the country; as guarantor of the constitution, he must counter this. Privately, however, PM Chief of Staff Lyovochkin told us on March 28 that the two Viktors held a more than four hour meeting to try to reach accommodation on a new, broad coalition and presidential representative to the Rada Zvarych announced that a new round of talks were set for April 2. Baloha said that Yushchenko had asked him to offer the PM a way out with a joint presidential-PM-Speaker appeal to the Constitutional Court to approve the constitutionality of imperative mandate and the unconstitutionality of the current CabMin law. In addition, Rada action on a package of new legislation on the presidency, CabMin, and opposition would restore the balance of power between branches of government and in the Rada. Foreign Minister Yatsenyuk seemed skeptical of Baloha's plan to approach to the CC, advocating a political settlement in the Rada, and undertook to consult with the PM.

12. (C) Comment. With two key allies of the President, former Prime Minister Yekhanurov and financial backer Poroshenko, threatening to jump to the coalition and Tymoshenko, Lutsenko, and part of Our Ukraine planning a protest on the Maidan on March 31, the pressure is on Yushchenko to decide how he will end the stand-off. Our own calculations suggest that if all the MPs in OU and BYuT who have the potential to defect do so, the new National Unity Coalition will have a slim 301 vote constitutional majority. However, we are not convinced that Yekhanurov and Poroshenko would want to join the coalition, as BYuT has argued they will, when they could sit in the middle and trade their votes. Moreover, it is hard to believe that some of these OU defectors would support all of Regions's agenda, such as abolishing the presidency or joining the Single Economic Space. The constitutional/legal argument for new elections is questionable and an issue for the Constitutional Court, although frankly we do not anticipate a Court ruling. In the absence of Court validation, if Yushchenko goes ahead with dissolving the Rada, the way forward will be messy, contentious, and potentially damaging to the country. But with power almost fully consolidated in Yanukovych's hands, the President's team feels their backs are up against the wall and are clearly pushing hard for confrontation and new elections. End summary and comment.

Tymoshenko: Dissolution is the Only Way

13. (C) On March 26, Tymoshenko told Ambassador that the majority coalition will soon have 304 votes if something is not done. She said that she had agreement from the people around the President that new elections were the solution, but she was not sure if Yushchenko himself was on board yet. There was no way to stop MPs from defecting and there was no time left to wait for Constitutional Court (CC) rulings. Because the coalition was usurping power so quickly, Yushchenko might need to move as soon as March 31 to disband the Rada. Poroshenko had been offered the Ministry of Finance if he came over to Regions's side and they might give someone else the National Bank. The legal rationale for disbanding the Rada would be Article 102 of the constitution, which says that the President must protect the rights of the people. (Comment. A stretch constitutionally.)

14. (C) Tymoshenko asked the international community to weigh in with Akhmetov, Yanukovych, and Moroz to ask them to cooperate with new elections and to keep everything peaceful. Tymoshenko said she herself was in contact with Akhmetov and Kluyev to give them a heads up, so they would not feel threatened. She also asked for public support from democratic states for what Yushchenko would do. Tymoshenko also said that she would not try to get people into the streets. (Note. She seems to have changed her mind on this point since BYuT subsequently decided to organize the March 31 Maidan protest. End note.)

The President's Legal Argument

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15. (C) Yushchenko issued a letter to the Rada on March 28, followed by a public statement on March 29 criticizing the Rada for behaving in an unconstitutional manner and questioning the parliament's legitimacy. The President's team on March 29 also leaked a draft decree to the press about dissolving the Rada. Yushchenko's representative to the Constitutional Court Volodymyr Shapoval, a retired CC judge, laid out his legal argument for dissolving the Rada for the Ambassador on March 29. There have been gross violations of the constitution, because MPs are not allowed to leave their faction (article 81) and individual MPs may not independently join the governing coalition, only factions can be coalition members (article 83). He added that articles 69 and 5 say the will of the people is expressed through elections and no one may usurp that power--MPs leaving the factions they were elected to is a violation of those clauses and as guarantor of the constitution, Yushchenko must protect the people's rights. He added that politically, if Yushchenko doesn't respond and MPs continue to violate the constitution, it sends a message that the constitution is not important. Shapoval admitted that he did not know if Yushchenko had accepted his argument, but Yushchenko's team is clearly using constitutional language in its public statements.

16. (C) Comment: In our reading of the constitution, the formation of the new faction Independent Ukraine (OU and BYuT MPs who defected) does seem to violate the constitution. The issue of individuals joining the coalition depends on how one reads the constitution. But we do not see how these "violations" necessarily or directly connect to any existing constitutional provision that gives the President the legal right to dismiss the Rada. Shapoval acknowledged that that was the case, which was why they were basing their argument on more broadly-written articles, like 102. If the President follows through with this approach, he will have to make a political argument to Ukrainians about why he needed to take this step to dissolve the Rada.

¶7. (C) In March 28 meetings with Ambassador, PM Chief of Staff Lyovochkin and Regions faction leader Bohatyreva rejected the idea of early elections and criticized Saturday's planned demonstration on the Maidan. They both predicted that at this demonstration, Yushchenko would be asked to dissolve the Rada. Lyovochkin argued that if a faction expels an MP, that MP can join the coalition as an individual. Bohatyreva concurred that the coalition itself is made up of factions, but individuals from other factions can vote with the coalition. Both doubted that the coalition would get 300 full members, but that a CC ruling and a constructive opposition would help clarify the situation. Lyovochkin was clear that he believed disbanding the Rada was illegal and Regions would see it as such. Bohatyreva said there would be a meeting in the Rada on March 29 to discuss how to respond to Yushchenko's letter. She said that he had cited specific articles of the constitution and they would have to weigh this seriously.

¶8. (C) However, Lyovochkin also told us that while Baloha and Tymoshenko's people were working on the decree to dismiss the Rada and recruiting protesters from across the country, the President and PM were engaged in a more than 4 hour meeting, trying to reach a compromise on forming a broad coalition. He argued that the confirmation of Yatsenyuk as Foreign Minister was proof that the two can cooperate. There was no public report of the results of this meeting, but Yushchenko's letter to the Rada was released to the press immediately following it, which could indicate that nothing was resolved. On the other hand, the British DCM in Kyiv told us that they had just heard that Yushchenko and Yanukovych might travel to Brussels together in April, also raising the possibility of cooperation.

Yushchenko May Be Undecided...

¶9. (C) After the letter, the statement, and the draft decree, Yushchenko gave a speech in Luhansk on March 29 where he called on all citizens to respect the constitution. But he stopped short of inflammatory language and instead called for consultations among all sides. Later, his representative in the Rada Roman Zvarych said that the PM, President, and Speaker would meet on Monday April 2 at 2 pm.

...But His Team Wants to Fight

¶10. (C) At the same time that Yushchenko was calling for

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renewed talks, Baloha told the Ambassador that at the President's order, he will meet with the PM to offer a way out that entails two demands. The first demand is that the President, PM, and Speaker all agree on a political position that would include enforcing the imperative mandate at all levels of government and invalidating the CabMin law. All three would go together to the CC to have this position affirmed. Second, the Rada leadership should agree on a package of bills on the presidency, CabMin, and opposition that together would both restore the balance of power in the government and restore the Rada to a 236-212 balance. He implied that if the PM does not accept these demands, Yushchenko's team will take steps that include dissolution of the Rada. The Ambassador suggested that an alternative strategy would be for the President, PM, and Speaker to go to the CC and just ask them to rule on the long list of cases and then accept whatever the rulings were. Baloha and his deputy Chaliy did not respond. They did suggest that this crisis would be resolved either internally or with assistance from the international community, perhaps from the G-7 ambassadors.

¶11. (C) Comment. Baloha and Chaliy's comments were not reassuring and the demands seem designed to provoke a negative reaction from the PM. Chaliy said that the current struggle came down to legitimacy versus legality. He argued that legitimacy was more important, although he and Baloha reiterated multiple times that the President's team would not do anything unconstitutional. Chaliy also said that they could not control what the response would be from Tymoshenko and Lutsenko if Yanukovych and Yushchenko made this agreement, but that the March 31 People's Union Our Ukraine conference and planned rally on the Maidan would be important. It seems that Baloha is pushing hard on the early elections and leading the charge on the President's side, but what is less clear is whether the confrontation-averse Yushchenko has bought into the fight.

¶12. (C) FM Yatsenyuk, until recently part of Baloha's team, was clearly not part of the presidential team's strategizing, but he told Ambassador that he used to be a lawyer and he was skeptical that going to the Constitutional Court was the right solution. It would be quicker and easier to work out a political compromise in the Rada and pass new laws to resolve the situation. He also thought laws on the presidency and opposition were unnecessary. He said he would undertake to talk to the PM before Baloha did.

The Disputed MPs in the Rada

¶13. (C) At the center of this constitutional fight are 43 MPs who are waiting to see which side prevails before deciding if they will stay in OU and BYuT or join the coalition. Some, like Yekhanurov and Poroshenko, may still hope that Yushchenko might go with them into the new coalition. If new elections seem likely, MPs may stay with their blocs. If the PM and the coalition prevail, they will likely switch their allegiance. In response to Ambassador's question as to whether these MPs will formally be in the coalition or just vote with them, Tymoshenko and MP Nemyria argued that it is not just a question of numbers, but of psychology. Regions wants the President to know and see that they control the Rada. BYuT MP Shvets echoed that argument--Regions needs to demonstrate complete dominance, not just win votes on a case-by-case basis. New elections, in our understanding, seem constitutionally shaky right now, but the fact that Yushchenko is even considering such a move suggests how much he feels that he has few options left.

What Would 300 Mean?

¶14. (C) Tymoshenko and Shvets argued that a constitutional majority of 300 MPs would allow Yanukovych to pass any policy he wanted, such as giving status to the Russian language or joining the Single Economic Space. They could even amend the constitution to abolish the presidency. Shapoval thought the danger lay in the fact that if Regions was allowed to collect 300 votes in violation of the constitution, it would send the political message to the government and the people that the constitution did not mean much--that would set a precedent for future violations. Bohatyreva said that if the coalition gained 300 members, they would not move to weaken or abolish the presidency. She said that Yanukovych did not want to move on the Russian language question because it was so divisive, but he did not want to alienate his electorate. (Note: Yanukovych said publicly on March 23 that if they had 300 votes, they would be obligated to give Russian a status. End note.) Bohatyreva also assured us that Regions had no intention of entering a customs union within the Single

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Economic Space.

Constitutional Court Footnote

¶15. (U) A former Constitutional Court judge announced on March 29 that a collegium of CC judges (6 of the 18) had rejected the President's petition to consider the constitutionality of the CabMin law. He attributed this decision to Yushchenko's decision to call the judges into his office and ask them to take action, which they interpreted as pressure. Normally, a collegium decision not to hear the case means the full Court will not consider it, but the chief judge can overrule the collegium. We will seek further information about next steps.

¶16. (U) Visit Embassy Kyiv's classified website:
www.state.sgov.gov/p/eur/kiev.
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